Realizing Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalization

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Abstract

There has been never-ending debate concerning the right to a healthy environment and the extent to which the law has provided for or guaranteed the right in national and international contexts. Whilst some countries have expressly recognised the right to healthy environment in their constitutions and subsidiary laws, others have relied on regional instruments and treaties for guaranteeing such rights especially where domestic legislation is either lacking, inadequate or ineffective. This article will contend that constitutionalizing (rather than regionalizing before a human rights commission or treaty) environmental rights domestically would improve environmental outcomes in Nigeria. To further buttress the constitutionalization argument, this article will undertake a critical analysis of the right to the environment in South Africa which has constitutionalized the right to the environment.

Introduction

There has been a constant debate concerning the rights to a healthy environment and the extent to which the law has provided for or guaranteed such rights in the national and international context. The right to enjoy a healthy environment stems naturally from the principles of fundamental human rights including rights to a safe, healthy, secure, clean or ecologically

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sound environment.[1] Where these rights are provided for, they are regarded as substantive rights and can be enforced against persons, states or entities. The right to a healthy environment (whether substantive or procedural) guarantees some level of environmental standards to groups or persons whilst also ensuring access to information, participation in the decision making process and access to justice amongst others.[2]

Some countries or states have expressly recognised these rights in their constitution and subsidiary laws, others have relied on regional instruments and treaties for guaranteeing such rights especially where domestic legislation is either lacking, inadequate or ineffective. This article analyses the substantive right to the environment by using case studies of South Africa and Nigeria while also making reference to other states or legislation where relevant. In essence, this article argues for the constitutionalization of the right to the environment in Nigeria.

This article will be divided into seven parts. The first part of the article will be this introductory section. The second part of the article is a general overview of the evolution of the international recognition for the substantive right to a healthy environment. The third part of the article focuses on the substantive right to a healthy environment in South Africa wherein it is embedded in its constitutional framework. The fourth part of the article dwells on the right to a healthy environment in Nigeria. However, in Nigeria, there is no express (constitutional) localisation of the right in the constitution. Thus, recourse is made to the African Charter on Human and People's Rights (a regional treaty) which has been domesticated in Nigeria. The fifth part of this article will undertake a comparative analysis of the substantive right to the environment in South Africa and Nigeria. This section of the article will highlight the differences between two counties and also considers whether South Africa has benefitted from

[1] D. L. Shelton, 'Human Rights and the Environment: Substantive Rights' [2011] GW Legal Research Paper No. 2013-33, 265. Available at: http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1242&context=faculty_publications

[2] D. R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment (UBC Press: Vancouver, 2012) 25

expressly providing for such rights and whether there is need for Nigeria to change the *status quo* or adopt other alternatives in the tackling the conundrum of enforcement and ensuring that the right to a healthy environment is guaranteed. The sixth part of the article will argue for the constitutionalization of environmental rights in Nigeria. This can be achieved in two ways: by amending the constitution to provide for a justiciable right to healthy environment or by expanding the remit of the extant justiciable rights embedded in the constitution to include the right to healthy environment. This article contends that expanding the remit of justiciable rights in Nigeria is the most likely alternative because of the difficulties inherent in amending the constitution. The seventh part of the article is the concluding section and it will aver that Nigerian constitution should be amended to incorporate the substantive right to a healthy environment.

General Overview of the Evolution of Environmental Rights

The relationship between the environment and human rights has been the subject of many scholars and this relationship (or otherwise) has been a never-ending debate or conundrum.[3] At the heart of the conundrum is 'the fear that the field of human rights, due to its almost exclusive concern with the protection and promotion of human rights of individuals and groups, might ignore or even hinder the protection of the environment *per se*.'[4] Ordinarily, human rights treaties do not explicitly protect the environment except such protection is essential for the fulfilment of human rights.[5] In furtherance of this, human rights scholars aver that

[3] A. Boyle, 'Human Rights or Environmental Rights? A reassessment' (2007) 18 Fordham Environmental Law Review 471, A. Boyle, 'Human Rights and the Environment: Where next?' (2012) 23 The European Journal of International Law 613, B. Lewis, 'Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection' (2012) 8 Macquarie J. Int'l & Comp. Envtl. L. 36,
T. Bulto, 'The Environment and Human Rights' in A. Mihr and M. Gibney (eds.) SAGE Handbook of Human Rights (SAGE: London , 2014) 1015

[4] Bulto, ibid at 1016

[5] Ibid

environmental issues should be embedded within the human rights category since the objective of environmental protection is to enhance the quality of human life.[6] On the other hand, environmental lawyers or scholars have argued that 'a human-centred, or anthropocentric, approach to the environment runs the risk of reducing all environmental values to a role merely of instrumental use for humanity whereby the quality of human life is enhanced. This somewhat utilitarian view of the environment would thus sacrifice environmental concerns on the altar of human rights.'[7] In essence, the different perspectives on environmental rights can be subsumed into substantive rights (including right to healthy and clean environment), procedural rights (right to freedom of information and the right to participate in the decision making process amongst others) and ecological rights (rights of non-human species to survive) or some combination thereof.[8]

The inclusion of environmental rights (or protection) within the human rights framework has been subject of strident criticisms.[9] It has been contended that to treat or place protection of the environment within the human rights architecture will dilute the human rights regime.[10] Also, establishing links between human rights and the environment ultimately leads to a dangerous decoupling.[11] Notwithstanding the criticisms of the link between the environment and human rights, the right to a healthy environment has been recognised as the basis for the implementation or enforcement of other fundamental human rights.[12] This is also in tandem

[6] Ibid
[7] Ibid at 1016
[8] A. Brisman, 'Environmental and Human Rights' in G. Bruinsma and D. Weisburd (eds.) Encyclopedia of Criminology and Criminal Justice (Springer: New York, 2014) 1344
[9] Bulto, above n .3, Boyle, above n. 3
[10] P. Alston 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 American Journal of International Law 607
[11] Boyle (2012), above n. 3
[12] L. A. Atsegbua et al, Environmental Law in Nigeria: Theory and Practice (Ababa Press: Lagos, 2004) 131. Also see U.J. Orji 'Right to a Clean Environment: Some Reflections' (2012) 42(4-5) Environmental Policy and Law 285

with decision of the International Court of Justice in Gabcikovo-Nagymaros where it stated thus:

> The protection of the environment is …a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration [of Human Rights] and other human rights instruments.[13]

It has been difficult to establish an all-encompassing definition for environmental rights. The Ksentini report has offered the broadest definition incorporating various components of substantive human rights to set out the meaning of environmental rights.[14] These include:

> freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well-being or sustainable development; protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems; the highest attainable standards of health; safe and healthy food, water and working environment; adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment; ecologically sound access to nature and the conservation and the use of nature and natural resources; preservation of unique sites; and enjoyment of traditional life and subsistence for indigenous peoples.[15]

Various national and international instruments have also attempted to define the meaning of environmental rights and some of them will be highlighted in this article.

Substantive rights to minimum health and environmental standards compatible with good health and well-being although interrelated to, are different from procedural rights to

[13] Case Concerning the Gabcikovo-Nagymaros Project, 1997, 91-92, cited in Bulto, above n. 3 at 1018
[14] Human Rights and the Environment: Final Report of Special Rapporteur Appointed by the Sub-commission on Prevention of Discrimination and Protection of Minorities (U.N. Doc. E/CN.4/Sub.2/1994/9, 1994).
[15] Ibid

information, participation in decision making process and access to justice.[16] Procedural rights are intended to ensure that decision making takes place with informed input from potential victims of the effects of such decisions and that avenues of redress are available for addressing harms that may occur. In essence, procedural rights are the legal pathways or processes undertaken by citizens (amongst others) to protect the environment. Substantive rights on the other hand, provides for limitations on the result of a process which ensures that the majority does not take advantage of their dominant position to discriminate or cause environmental harm at a level that infringes the enjoyment of human rights and environmental goods.[17]

Similarly, the concept of environmental justice has developed from its initial beginnings in the United States of America from an intra-national struggle instigated by the civil rights and environmental movements of the 1960s and 70s, into a relationship between governments and their people, corporate entities and stakeholders. At the global level, it has become increasingly attractive as a result of its compatibility with the existing sustainable development paradigm geared towards environmental sustainability and public participation in the development process.[18]

Generally, there is no international or multilateral treaty that expressly guarantees the right to a healthy environment or the protection of the environment.[19] However, there are plethora of international, regional, soft law mechanisms and national constitutions which make allusions to the right to a healthy environment.[20] For example, under international law, there has been the recognition of a need to protect the earth and its environment including its natural resources,

[16] See Shelton, above n. 1
[17] Ibid
[18] R.T Ako, Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific (Routledge: Oxford 2013) 4
[19] Lewis, above n. 3, S. Turner, Substantive Environmental Right – An Examination of the Legal Obligations of Decision- Makers towards the Environment (Kluwer: Leiden, 2009)
[20] Lewis , above, n. 3

air, water, land, flora and fauna, for both the current and future generations.[21] This has led to the proliferation of various regional and international treaties established for facilitating this objective. The United Nations General Assembly (UNGA) in 1968 passed a resolution establishing the relationship between the quality of the human environment and the enjoyment of basic environmental rights.[22]

Soon after this resolution, the 1972 Stockholm Declaration, regarded as the first international articulation of an environmental right was issued. The Declaration states that 'both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of his basic rights – even the right to life itself.'[23] This declaration exemplifies the link between human rights and environmental protection. Furthermore, the African Charter on Human and People's Rights,[24] which was developed under the auspices of the Organisation of African Unity now African Union (AU)[25] has made substantive provisions for environmental rights. Article 24 provides that, 'all peoples have the right to a general satisfactory environment favourable to their development'.

The United Nations Human Rights Commission provides for a more substantive formulation of environmental rights and it posits thus:

> all persons have the right to a secure, healthy and ecologically sound environment including that which is adequate to equitably meet the need of the present generations

[21] Sebhancock, 'A Right to a Decent Environment: Are Human Rights Sustainable?' (2011) Available at: http://www.slideshare.net/sebhancock/a-right-to-a-decent-environment-are-human-rights-sustainable#
[22] Problems of the Human Environment, General Assembly Resolution 2398, UN GAOR, 23rd session, Supp. No. 18, U.N. Doc A/7218 (1968).
[23] Stockholm Declaration on Environment and Development [1992] UN Doc. A/conf.48/14/Rev. 1.
[24] African Charter of Human and Peoples' Rights OAU CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 entered into force Oct. 21, 1986
[25] Formerly Organization for African Unity (OAU). Also, it has been contended that '[a]mong human rights treaties it is only the 1981 African Charter on Human and Peoples' Rights proclaims environmental rights in broadly qualitative terms.' See Boyle (2006-2007), above n.3 at 474

> and at the same time does not impair the rights of future generations to equitably meet their needs.[26]

The Earth Summit of 1992 that produced the Rio Declaration on Environment and Development affirmed that states had the right to exploit their own resources and also placed a responsibility on states to ensure that the activities within their jurisdiction does not harm the environment of other states.[27] On the other hand, while the Aarhus convention[28] which is the first multilateral environmental agreement[29] is widely regarded as having global significance in its recognition of environmental rights. However, it has been argued that it only safeguards procedural rights rather than substantive rights to environment.[30]

From the foregoing, the aforementioned regional and international treaties have tried to create a framework for strengthening and laying down the foundations for substantive rights to a healthy environment at the global level. However, it is important to note that while there has been substantial development in the jurisprudence of environmental rights internationally, the law-making bodies of some states have drafted constitutional and legislative provisions to fall in line with the internationally guaranteed rights to a healthy environment and also impose on the state, a duty to prevent environmental harm and call for protection of the environment and natural resources.[31]

As earlier highlighted, the analysis on the provision or promotion of substantive rights to enjoy a healthy environment will be exemplified using South Africa and Nigeria as case studies. In respect of South Africa, this article will examine how the country's historical socio-economic

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[26] UN ESCOR Sub-Commission on Prevention of Discrimination and Protection of Minorities, ESC Res 1990/43, UN Doc. E/CN 4/1990/94, 104.
[27] Rio Declaration on Environment and Development [1992] <UN Doc A/CONF.151/26. Available at: http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163
[28] Aarhus Convention, Status of Ratifications in UN Treaties Database, Chapter 27: Environment.
[29] See Boyd, above n. 2 at 87
[30] O.W. Pederson, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008) 21 (1) Georgetown International Environmental Law Review 99
[31] See Shelton, above n. 1 at 267

and political development has shaped their perception of environmental justice (right) and how past challenges have been remedied by the constitution and subsidiary legislations. On the other hand, in respect of Nigeria, an analysis the inter-play of rights of resource ownership and communities *vis-à-vis* its inherent challenges and prospects will be in focus. The rationales for focusing on South Africa and Nigeria for this analysis is that while the former has expressly provided for substantive environmental rights in its constitution, the latter has had to rely on the African Charter to guarantee the protection of rights to a healthy environment to foster the environmental justice movement or environmental protection in the country.

Substantive Right to a Healthy Environment in South Africa

The perception of environmental justice in South Africa stems largely from the country's political and socio-economic history. The general lack of rule of law and constitutionalism and lack of respect for and protection of human and environmental rights reigned supreme during the apartheid regime.[32] The apartheid regime which meted substantial injustices on blacks and other minorities including the dispossession of indigenous communities of their lands, usurpation of their access to justice to seek redress and the inequitable and disproportionate distribution of socio-economic opportunities thereby leading to a lack of participation in the political process of the country have led to a total upheaval in the status quo following the end of the apartheid era.[33]

Following a democratic transition in 1994, the promotion and recognition of socio-economic rights, civil, political and environmental rights was facilitated following the adoption of the

[32] L. Kotze, 'The South African Environment and the 1996 Constitution: Some reflections on a Decade of Democracy and Constitutional Protection of the Environment' (2007) 1(1) Direitos Fundamentais and Justica 36-57 at 38.
[33] See Ako above, n. 18 at 43

Republic of South Africa Constitution (RSAC) 1996. The constitution expressly provides for the substantive rights to a healthy environment for the protection of human rights, and promotion of equality irrespective of race, colour and ethnicity amongst others. Section 24 of the RSAC states that:

> Everyone has the right:
>
> (a) To an environment that is not harmful to their health or well-being; and
> (b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
> (i) Prevent pollution and ecological degradation
> (ii) Promote conservation; and
> (iii) Secure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development.

Furthermore, section 24(a) exemplifies the provisions of the rights to a healthy environment as a fundamental right, while section 24(b) places an obligation on the government and authorities to act by means of reasonable legislative measures and activities to promote public participation in the environmental related decision making processes at all levels.

Also, section 24 as it is, is a right in itself and thus is enforceable. This entails that substantive rights to the environment is expressly provided for and need not be inferred from other human rights classifications as is obtainable in some jurisdictions.[34] The intent of section 24(b) was highlighted in *Government of the Republic of South Africa and Others v Grootboom and Others*,[35] where the constitutional court stated thus:

[34] Ibid at 44
[35] [2001] 1 SA 46 (CC)

> the socio-economic rights are expressly included in the bill of rights; they cannot be said to exist on paper only … [T]he question is therefore not whether socio-economic rights are justiciable under our constitution, but how to enforce them in a given case.[36]

The accommodation of environmental rights in the constitution warranted the formulation of various subsidiary legislation to conform to the constitutional imperatives. However, the constitution only acts as a supplement to subsidiary legislation and cannot be directly relied upon except in circumstances where such other laws have fallen short of the standards envisaged by the constitution.[37] Some of the legislation include; the National Environmental Management Act 107 of 1998 (NEMA), the Draft National Policy Framework for Public Participation of 2005, the Restitution of Lands Rights Act 22 of 1994, the White Paper on Integrated Pollution and Waste Management of South Africa of 2000 (IPWM), the National Environmental Management: Waste Management Bill of 2007 and the Promotion of Access to Information Act 2 of 2000 (PAIA). Owing to the fact that local governments authorities and municipals are deemed very important in promoting public participation in decision making processes, the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) were also formulated to serve and strengthen the constitutional framework.[38]

The NEMA, which is South Africa's principal environmental management framework law,[39] encapsulates a number of environmental principles including biodiversity,[40] mining,[41] air quality[42] and protected areas[43] amongst others. It advocates that protection of all interested and

[36] Ibid.
[37] See Ako, above n. 18 at 43
[38] A. Du Plessis, 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 11(2) *Potchefstroom Electronic Law Journal* 1. Available at : http://www.ajol.info/index.php/pelj/article/view/42232
[39] Ibid.
[40] National Environmental Management: Biodiversity Act 10 2004.
[41] Mineral and Petroleum Resources Development Act 28 2002.
[42] National Environmental Management: Air Quality Act 39 2004.
[43] National Environmental Management: Protected Areas Amendment Act 15 2009.

affected persons (I&APs) in environmental governance must be promoted to afford them the opportunity to enhance their understanding, skills and capacity required for the achievement of equitable and effective participation while also accommodating the interest of the vulnerable and disadvantage people.[44] The various laws under the NEMA seeks to tackle questions ranging from the nature of constitutionally guaranteed rights to environment, its relationship with other constitutional rights and also the role of the environment in sustainable development.[45]

The courts in South Africa have adapted the right to a healthy environment in cases involving land development, mining, air pollution, nuclear energy, waste incineration and toxic substances.[46] In *Director Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*,[47] the respondents, an association of property owners along the Vaal River interested in maintaining the environmental integrity and value of the river succeeded against the respondents in a lower court to prevent open-cast mining in the area. Dismissing this appeal, the court of appeal held that the constitution:

> By including environmental rights as fundamental justiciable human rights by implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country. Together with the change in the ideological climate, there must also come a change in the legal and administrative approach to environmental concerns.[48]

Also, in *BP South Africa v MEC for Agriculture Conservation, Environment and Land Affairs*,[49] the court held that by the singular act of elevating the environment to a fundamental

[44] Section 2(4) f National Environmental Management Act 1998.
[45] See Ako, above n.18 at 45
[46] See Du Plessis, above n. 38
[47] [1999] 133/98, 2 All SA 381.
[48] Ibid.
[49] [2004] 03/16337, ZAGPHC 18.

justiciable human right, South Africa has positively embarked on a journey that will lead to the attainment of a protected environment by integrated approach while also considering socio-economic concerns and principles.[50]

In *Khabisi NO and another v Aquarella Investment 83 (pty) ltd and others*[51] which dealt with restraining construction in an ecologically sensitive area, the court of appeal opined that if a housing estate project was to be executed in an area of high biodiversity values and vulnerable endangered species, it will threaten the environmental health, ecology and biodiversity. Furthermore, the court held that the effect and harm of such a project will have far-reaching irreversible consequences for the entire society at large and will thus renege the soaring ideals encapsulated by the constitution.[52]

In circumstances where the state or its administrative authorities are in dispute with an individual or community over protection of the environment, there is almost always a face-off between the sustainable development intent of the government and the right of the individual or group to have an environment that is healthy and habitable. Sustainable development thus brings with it the risk of environmental damage. The courts have taken cognizance of this in determining issues of such nature. In this regard, one of the highest profile decisions reached by the South African courts on the protection of a right to a safe and healthy environment for both the current and future generations was in *Fuel Retailers Association of South Africa v Director-General Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* (Fuel Retailer's case).[53] The significance of this case is that it has come, not from the usual ecologists, activists and the likes, but from an industry frequently berated for establishing worldwide reliance on non-renewable energy

[50] Ibid.
[51] [2007] ZAGPHC SA 195.
[52] Ibid.
[53] [2007] 10 BCLR 1059.

sources and for breeding pollution.[54] The issue before the court was whether a proposed filling station project should be allowed to go ahead by the environmental authorities, based on its social, environmental and economic sustainability. The constitutional court overturned the authorization of the project stating that notwithstanding the interrelationship between the environment and socio-economic development, the importance of the protection of the environment cannot be overemphasized. The court concluded thus: 'the present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that the duty is carried out.'[55]

From the foregoing, it is evident that the most far-reaching claims for environmental rights transcends from claims to a decent, healthy or viable environment to a substantive environmental right involving the promotion of a certain degree of environmental quality. It is imperative however to note that in order to recognize environmental rights as a right of recipience, there is need to identify the duty holders with the obligation to either facilitate environmental rights or enable the facilitation thereof.[56] Environmental rights should be perceived as human rights that represent in a legal and integrated fashion, the interrelationship between human beings and the environment which also extends to their cultural heritage, habitat and health.[57]

Furthermore, section 27(1) b of the RSAC guarantees the right of everyone to have access to sufficient food and water. As regards access to sufficient water, many sanitation facilities cannot function effectively without sufficient water. The environmental rights confers an obligation on the government to prevent pollution and ensure the conservation of water

[54] See Boyd, above n. 2 at 153
[55] *Fuel Retailer's case*, above n. 53 at [95]-[96]
[56] See du Plessis, above n. 38 at 5
[57] Ibid at 5

resources.[58] The National Water Act 1998 and the Water Service Act 1997 is concerned with water policies and principles which includes the abrogation of discrimination to access to water based on race, class or gender.[59] Among the aims of the National Water Act is the promotion of equitable access to water, facilitation of social and economic development and the reduction and prevention of pollution of water resources.[60] Section 2(a) of the National Water Act gives effect to the constitutional right of everyone to sufficient water by providing for the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and environment not harmful to human health and well-being.

In *Lindiwe Mazibuko and Others v City of Johannesburg and Others,*[61] the plaintiff argued that the city's policy on daily rationing of water and the way it was implemented was unlawful, unreasonable, unfair and in breach of their constitutional rights to water as contained in section 27 of the constitution. The constitutional court held that the duty imposed on the government by section 27 is an obligation to take all reasonable legislative measures to pursue the progressive realization of the right to sufficient water. Noting that it was not within the scope of authority for the court to define what constitutes "sufficient water", the court noted that it cannot be unreasonable for the city to supply more water particularly given that the community in question was quite condensed and highly populated.[62]

From the rich jurisprudence of case law and legislation covering almost every aspect of the environment, it is undeniable that South Africa is positive with regards to providing access to justice and ensuring protection of the environment transcending from the constitutional recognition of the expressly provided substantive rights to a healthy environment. It is also

[58] J. Razzaque, 'Human Rights and the Environment: the National Experience in South Asia and Africa' [2002] Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment. No 4.
[59] Ibid
[60] Ibid
[61] 2010 (3) BCLR 239
[62] Ibid

been contended that the South African government 'plans to re-introduce environmental courts but with limited jurisdiction to hear cases pertaining to environmental crimes.'[63] However, it can be contended that notwithstanding the impressive case law and jurisprudence on environmental rights in South Africa, the country's environmental protection record remains weak. Thus, many vulnerable citizens and communities still lack access to justice in South Africa.[64] Also, it has been contended that recent socio-economic rights cases in South Africa appears to be in support of neo-liberal laws and policies.[65] This was highlighted in the Mazibuko case.[66] According to Akintayo, the three implications of Mazibuko on socio-economic rights paradigm in South Africa include:

> [I]t legitimates and sanctions neo-liberalism. In effect the Constitutional Court told the government in very clear language that it can forge ahead with neo-liberal laws and policies notwithstanding any negative impact on constitutionally guaranteed socio-economic rights. The second implication is that *Mazibuko* has turned socio-economic rights in South Africa into a privilege, something that can only be enjoyed at the pleasure of the government…The third implication flows from the first two. It is that *Mazibuko* has consequently converted South Africa's socio-economic rights into mere paper rights, existing in the texts of the South African Constitution without corresponding effect or impact on supposed right bearers.[67]

Substantive Rights to a Healthy Environment in Nigeria

The constitution of Nigeria 1999 does not provide for substantive rights to a healthy environment. The closest inference of the states' duty to environmental protection is contained

[63] Ako, above n. 18 at 59
[64] ibid
[65] E. Akintayo, 'A good thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights-lessons from the Nigerian case of Bamidele Aturu v Minister of Petroleum Resources and Others: case reviews.' (2014) 15 (2) ESR Review: Economic and Social Rights in South Africa 5
[66] Mazibuko case above n. 61
[67] Akintayo, above n. 65 at 6

in section 20 of the constitution. It provides that the government should 'protect and improve the environment and safeguard water, air, and land, forest and wildlife in Nigeria'. The wordings of this section has drawn criticisms as being quite broad and also falling under chapter II of the constitution, making it non-justiciable and in effect, unenforceable.[68] As a result of this; victims, communities and NGOs amongst others have made recourse to the African Charter as a means of safeguarding rights to a healthy environment.

By adopting and domesticating the African Charter by virtue of the African Charter on Human and People's Rights (Enforcement and Ratification) Act 1983 into its legal framework, Nigeria has made the charter provisions part of its laws and have thereby given it effect locally.[69] Article 24 of the African Charter provides that, 'all peoples shall have the right to a general satisfactory environment favourable to their development.' In essence, article 24 provides the rights of the African people to a healthy environment and by domestication, Nigeria has imbibed the rights which are also enforceable in Nigeria.[70]

The enforceability character of the African Charter in Nigeria was further recognised in *General Sani Abacha and Others v Chief Gani Fawehinmi*[71] where the supreme court held *inter alia* that where a treaty is enacted into law by the national assembly, it becomes binding and the courts must give it effect like all other laws falling within the judicial powers of the state.[72]

[68] E.O. Ekhator, 'Improving Access to Environmental Justice under the African Charter on Human and Peoples Right: the Roles of NGOs in Nigeria' (2014) 22 (1) African Journal of International and Comparative law 63 at 66. Also, see section 6(6) (c) Chapter II Fundamental Objectives and Directive Principles of State Policy, Constitution of Nigeria 1999.
[69] Ako, above n.18 at 24-25.
[70] Ibid 25. However, there are a plethora of authors that have argued that the right to healthy environment is not justiciable nor enforceable in Nigeria because the Nigerian constitution is the supreme law in country and it does not provide for the right to a healthy environment. Generally see R. T. Ako, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India' 3 *National University of Juridical Sciences Law Review* (2010) 423, G. Ogbodo, 'Environmental Protection in Nigeria: Two Decades after the Koko Incident' 15(1) *Annual Survey of International and Comparative Law* (2009) 1
[71] [1997] SC 45.
[72] Ibid.

Thus, to make the provisions of the substantive rights to a healthy environment worth the paper they are written on, it must be judicially enforceable nationally.[73]

The vast majority of Nigeria's oil resources are concentrated in the Niger Delta region of the country. Many multinational corporations carry out their oil exploiting high-technology based industrial activities in the Niger Delta and the business of oil extraction has resulted in numerous cases of oil spillages and gas flaring in the area.[74] This has posed severe environmental hazards to the people of the Niger Delta, affected their livelihood, and ultimately diminished the economic benefits that should normally accrue to them.

Oil spillages on land adversely affects the availability of productive farmlands which sometimes take several years to become cultivable.[75] Water pollution from oil spillages has been detrimental to Niger Delta environment thereby impacting negatively on drinking, fishing and other economic alternatives, which are almost completely destroyed.[76] The far reaching effects of these hazards in the region adversely affects the entire livelihoods of its inhabitants. Nigeria flares the second largest amount of natural gas in the world, Russia has the worst record.[77] The frequency of gas flaring has caused untold harm in the Niger Delta causing release of greenhouse gases into the atmosphere and also cases of acid rain amongst other negative impacts.[78] This has inevitably destroyed plants and wildlife in the area.

In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAC) v Nigeria,*[79] the NGOs representing the Ogoni people alleged that the community's

[73] Ako above n.18 at 25.
[74] K. Ebeku, 'The Right to a Satisfactory Environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 156. Also, for an extensive analysis of the roles of government agencies in oil spillage control in Nigeria see E.O. Ekhator 'Environmental Protection in the oil and gas industry in Nigeria: the roles of governmental agencies' (2013) 5 International Energy Law Review 196.
[75] Ebeku Ibid at 157
[76] Ibid.
[77] US EIA "Country Analysis Brief Overview: Full Report (Nigeria)" December 2013. Available online at http://www.eia.gov/countries/analysisbriefs/Nigeria/nigeria.pdf
[78] See Ebeku, above n. 74 at 159
[79] Communication No. 155/96, Case No. ACHPR/COMM/A044/1.

right to enjoy a healthy environment as guaranteed by the provisions of the African charter had been infringed upon by the federal government of Nigeria and the oil multinationals carrying out exploration and production activities in the area. The NGOs also contended that the Ogoni people had suffered degrees of human rights abuses and substantial degradation of the environment. The NGOs relied specifically on articles 16 and 24 of the African Charter which guarantees the right to a healthy environment. The African commission noted that it is the obligation of the state to protect the holders of environmental rights against subjects by making legislation and effective remedies which will facilitate an effective interplay of laws and regulations that will enable individuals realise their rights and freedoms.[80] In essence, notwithstanding that Nigeria has a right to develop its natural resources, it should take necessary steps to prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources.[81]

Similarly, in *Jonah Gbemre v SPDC and others*,[82] a case where the plaintiff alleged that his community (Iweherekan Community) had suffered the hazards of gas flaring for decades. The court held that the plaintiff's right to life and human dignity enshrined in the Nigerian constitution, must be broadly interpreted to include the right to the enjoyment of a healthy environment.[83] The court ordered that gas flaring must be stopped as it violates the guaranteed constitutional rights to life and human dignity. This case has been appealed by the defendants and when fully determined, may potentially change the legal landscape of enforcement of environmental rights, especially in relation to Nigeria's oil sector.[84] This case has been

[80] Ibid at 46
[81] Ibid at 68
[82] Suit No. FHC/B/C/153/05 in the Federal High Court of Nigeria, Benin Division.
[83] Ibid at 14-15
[84] Ako, above n. 18 at 26

regarded as a milestone in Nigeria and it is the first known case where the courts have declared gas flaring as illegal and a breach of fundamental human rights.[85]

The menace of natural resource exploitation in the Niger Delta have led to several factors that threaten the survival of the people of the region including flooding, loss of biodiversity, erosion, ecological destabilization and reduction in aquatic resources in the area. Other issues are loss of special amenities, insecurity, political instability, loss of social amenities amongst others.[86] Civil rights groups and associations have been at the forefront in articulating the grievances of the people in the region and demand restorative socio-economic development in the area as a way of compensating the negative consequences arising from oil exploration activities in the country.

Although section 16(2) of the constitution provides that at least 13% of oil revenues be paid to the oil-bearing state, this is a relatively meagre amount bearing in mind that these communities bear the brunt of the hazards associated with the activities. However, the constitution does not make any provisional safeguards for the effective utilization of this money to the benefit of the communities. Also, corruption, embezzlement, mismanagement, alleged underfunding amongst other factors, have led to the inherent set-backs, poverty rates and underdevelopment in the Niger Delta region.[87] The creation of interventionist agencies such as the Niger Delta Development Commission (NDDC) and the Ministry of Niger Delta amongst others have failed to make substantial impacts in contributing to the development of the Niger Delta.[88]

Having considered the provisions of substantive rights in South Africa and Nigeria, questions remain whether such provisions have necessarily enhanced the environmental justice/rights

[85] D. Olawuyi, The Principles of Nigerian Environmental Law (Business Perspectives, Ukraine 2013) 74
[86] Ibid at 146
[87] Ako ,above n. 18 at 30
[88] Ibid

movement because of the differences between South Africa's express constitutional provisions on substantive rights, and the reliance on the African Charter in Nigeria.

Furthermore, when litigants get favourable decisions against the state or oil multinational corporations, the decisions are either appealed or out rightly ignored.[89] For example, the Nigerian government and Shell refused to abide by the decision of the court in the *Gbemre*'s case. Also, in *Pere Ajunwa (on behalf of Ijaw Aborigines) v Shell Nigeria*,[90] a federal court held that Shell was legally bound to pay the sum of US$1.5 billion as compensation to an oil-producing community as ordered by Nigerian National Assembly. However, Shell declined and filed procedural objections in court to frustrate the enforcement of the judgement.[91] Notwithstanding that the aforementioned cases (involving Shell) are not human rights centred, they represent a further legal pathway that has been utilised with little success in parallel with the human rights challenges.

Comparative Analysis of Right to Environment in South Africa and Nigeria

As already highlighted in the earlier parts of this article, South Africa has made provisions for substantive rights to a healthy environment via constitutional provisions. Nigeria on the other hand, relies on the African Charter. Both countries have had varying successes with regard to the impact of the environmental rights provisions and these differences will be considered via the roles of the government, public participation in the decision making process and the attitude of the judiciary.

The South African constitution having expressly provided for substantive rights to a healthy environment; places an obligation on the state and its authorities to make policies and

[89] Ekhator, above n. 68 at 69
[90] SC 290/2007, cited in Ekhator ibid
[91] See Ekhator, above n. 68 for further analysis.

legislative measures towards the protection of the environment.[92] It is evident that from the analysis above, that the state (South Africa) has taken a positive and activism based approach towards the environment. For example, the Reconstruction and Development Policy (RDP) initiated by the government through which measures of land restitution, redistribution and security of tenure were carried out only points to this fact. Thus, courts have interpreted the constitutional provisions to strike a balance between environmental protection and sustainable development by weighing them against public interest policies.[93] The positive attitude of the government has undoubtedly benefitted the environmental justice movement.

However, in Nigeria, while the government can be said to have taken some positive steps towards the environmental protection through the establishment of interventionist agencies including the NDDC and the Ministry of Niger Delta amongst others, there has been episodes of interference with the enforcement of environmental rights in litigation. In the *Gbemre*'s case, notwithstanding that the case is on appeal, the government has not effected any of the orders made by the high court.[94] Also, Shell appealed this judgement, the court of appeal found that a court staff had wrongfully adjourned the case without notice to the applicant or his counsel. Although the judge promised to investigate the matter and take necessary disciplinary action against the offender, nothing has been heard of the issue. In his reaction, the co-chairman of the climate justice programme has observed that these actions by the court official in *Gbemre*'s case suggests that there is a degree of government interference in the judicial system which is unacceptable in a democracy acting under the rule of law.[95]

Second, the level of public participation, especially of interested and affected persons in the Niger Delta region have been abysmal. The closest inference of public participation was

[92] Section 24(b) RSAC
[93] Section 25.
[94] Ako, above n. 70 at 437.
[95] Friends of the Earth International Press Briefing, 'Shell fails to obey gas flaring Court Order' (2007). Available at: https://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007

provided in section 7 of the Environmental Impact Assessment Act[96] (EIAA) which only allows members of the public an opportunity to 'comment' on the environmental impacts of projects that could potentially affect them, their livelihoods and their rights to a healthy environment. This comment based participation is inherently insufficient as there should be a better interaction between the government, civil society and affected persons including processes of open dialogue, establishment of partnership, information sharing and evaluation of developmental policies and programmes with regard to projects that may potentially affect its host communities.[97] Notwithstanding that government policies in Nigeria tend to advocate the need for public participation, sufficient policy framework or practice mechanisms have not been effectively put in place to achieve this objective.[98]

However, South Africa makes quite substantial provisions for public participation via local government ward committees, public meetings, comments after press notices and integrated development planning for various laws and policies.[99] Regulation 54-57 of South Africa's EIA Regulations 2010 also plays an efficient and effective role to ensure public participation in the EIA process.[100]

Third is the role and attitude of the judiciary. Going by the cases that have been decided by the courts in South Africa, they have continued to stress the existence of the right to a healthy environment for everyone. In essence, courts in South Africa have elevated the environment to a fundamental justiciable human right, adopting an integrated approach which inter alia; takes

[96] Environmental Impact Assessment Act, CAP E12, LFN 2004
[97] du Plessis, above n. 38 at 5
[98] Ibid
[99] Ibid
[100] T. Murombo, 'Beyond Public Participation. The Disjuncture between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' (2008) 11(3) *Potchefstroom Electronic Law Journal* 106. Available at: http://www.saflii.org/za/journals/PER/2008/18.html

into considerations, economic concerns and principles.[101] Arguably, this positive approach contributed in promoting the environmental protection in the country.

In Nigeria, there has been several judicial obstacles undermining environmental right cases. These obstacles include *inter alia*; delays in the judicial process and strict requirement for the proof of *locus standi* amongst others.[102] Regarding the issue of standing (*locus standi*), the lack of clarity on rules and procedure has also largely contributed in hindering access to justice.[103] This was evident in *Oronto Douglas v Shell*,[104] where the plaintiff, an environmental activist from a community affected by the defendants' oil operations activities was denied standing by the court. In essence, Nigerian courts should apply the provisions of the African charter and interpret the human rights provisions in the constitution positively to ease the frustration and undue delay suffered by the affected parties.

A good example of a country which like Nigeria has no substantive constitutional environmental rights is India. Analogous to the position in Nigeria, the only inference of environmental rights is contained in Article 48A [105] of the Indian constitution and is unenforceable in court. However, hundreds of cases have been determined by Indian courts on the grounds of, or influenced by, the mere recognition of a right to a healthy environment.[106] Based on the positive attitude of the Indian courts, it is not surprising that the statistics have shown that up till 1999, nearly 80% of cases were resolved in favour of the environment.[107] Although the Indian courts have at times been criticized and regarded as overstepping the boundaries of their authority, they have kept a positive and favourable attitude towards

[101] Boyd, above n. 2 at 152
[102] Ekhator, above n. 68 at 67-68
[103] Ako, above n. 70 at 444
[104] [1999] 2 NWLR Part 591, 466.
[105] Constitution of India (Ninety-Eight Amendment Act) 2012.
[106] Boyd, above n. 2 at 177
[107] C.M. Jariwala, 'The Directions of Environmental Justice: An Overview' in S.K. Verma and K. Kusum (eds.) In Fifty Years of the Supreme Court of India: its Grasp and Reach (Oxford University Press; India, 2004) 469-94

protecting the environment. This kind of attitude if adopted by the Nigerian judiciary, will definitely go a long way in recognising and enforcing the substantive rights to a healthy environment.

Furthermore, it can be argued that similar results to South Africa and India can be achieved simply by rendering the Nigerian legal system more efficient, especially when it comes to enforcement of court judgements against defendants (especially oil multinational corporations) that are prone to appeal and continue to appeal against initial legal decisions against them. However, the regulatory gamut of oil and gas sector in Nigeria has been ineffectual and this is due to a lot of reasons; including corruption, lack of political will of the central government, failure to implement or enforce laws and the deliberate acts of MNCs defying the extant laws.

The next section will argue for the constitutionalization of environmental rights in Nigeria.

Case for the Constitutionalization of Environmental Rights in Nigeria

Constitutionalization of environmental rights in Nigeria as used in this paper 'refers to substantive rights, which independently of extant protected rights, bestow, advance and/or protect citizen's rights to derive and enjoy the benefits of a healthy environment.'[108] Arguably, the constitutionalization of the right to a healthy environment in Nigeria is preferable than reliance on the African Charter. The African Charter is beset by many ills in Nigeria. For example, as highlighted earlier in this article, the African Charter has been domesticated into law in Nigeria, thus, it is seen as part of its national law. In *General Sani Abacha v Chief Gani*

[108] R.T. Ako 'Promoting Environmental Justice in Developing Countries: Thinking Beyond Constitutional Environmental Rights' (2014) at 2. A Paper presented at the 3rd UNITAR-Yale Conference on Environmental Governance and Democracy, available at: http://conference.unitar.org/yale2014/sites/conference.unitar.org.yale2014/files/2014%20UNITAR-Yale%20Conference-Ako_0.pdf

Fawehinmi[109] where the Supreme Court held that notwithstanding that the African Charter is part of Nigerian law, whenever there is a conflict between the Charter and the constitution, the constitution will prevail.[110] Furthermore, African Charter (Ratification and Enforcement) Act can be amended or repealed by the National Assembly. Thus, scholars have posited that the African Charter is not an appropriate tool in promoting environmental rights in Nigeria.[111] Hence, constitutionalizing environment rights will be a better alternative.

This section of the article will contend that constitutionalization of environmental rights in Nigeria can be actualised by amending the constitution to provide for a justiciable right to healthy environment or by expanding the remit of the extant justiciable rights embedded in the constitution to include the right to healthy environment. As highlighted during the course of this article, environmental rights are not justiciable nor enforceable in Nigeria because section 20 of the constitution which states that the "state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria' is provided for in Chapter II (which focuses on economic, cultural and socio-economic rights). Chapter II of the constitution is not enforceable, however, chapter IV of the constitution which promotes civil and political rights "are enforceable against the State and citizens."[112] Thus, Ako and Adedeji have argued for the constitutionalization of environmental rights in Nigeria and they averred thus:

> This may be through amending the CFRN [constitution] to make the environmental rights enforceable or passing new legislation on the issues. It is however preferable to raise the status of environmental rights to constitutional level to avoid the trade-offs that are common occurrences in the legislative process. The supremacy of

[109] *Abacha v Fawehinmi*, above n. 71
[110] See Ekhator, above n. 68
[111] O. Oluduro 'Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities' (Intersentia Publishing; Cambridge, 2014), Atsegbua et al above n. 12 at 143
[112] Ekhator, above n. 68 at 66

> constitutional guarantees plays out in the very nature of the constitution as the grundnorm of laws in any democratic nation.[113]

However, constitutional amendments in Nigeria is a tedious and difficult process.[114] Section 9 of the constitution provides for the procedure in amending or altering the constitution. Section 9(2) states thus:

> an act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

For example, the present National Assembly has been unable to amend the Land Use Act 1978 which is attached to the constitution by virtue of section 315(1) (5) (d) and it can only be amended via constitutional amendment procedures which are cumbersome.[115] Arguably, due to the cumbersome amendment procedure in the constitution, a constitutional right to the environment will not be actualised in Nigeria in the nearest future.

Notwithstanding, the difficulties in entrenching an express right to the environment in the constitution, a possible pathway will be the expansion of the extant civil and political rights in the constitution. Some of these rights include; right to life, right to dignity and right to property amongst others. Recently, the Nigerian judiciary has been at the forefront in expanding the

[113] R. Ako and A. Adedeji 'Public Participation: An Imperative to the Sustainable Development of the Nigerian Oil Industry' (2009) 37 Banaras Law Journal 34 at 53, available online at http://www.bhu.ac.in/lawfaculty/bljvol37_38.html

[114] N. Ofo 'Amending the Nigerian Constitution' (2010) 4 (2) African Journal of Legal Studies 123

[115] To buttress this assertion that the Land Use Act is difficult to amend, the Deputy Senate President of the Nigerian Senate who is also the Chairman on the Review of the 1999 Constitution averred that it was impossible to amend the Land Use Act and the amendment process failed to scale through the Third Reading during the Senate amendment process of the Constitution. See Ogunmade, O. 'Ekweremadu advocates Removal of the Land Use Act' Thisday February 9th 2014 2014. Available at: http://www.thisdaylive.com/articles/ekweremadu-advocates-removal-of-land-use-act/170938/ Generally see Ofo ibid

remit of extant civil and political rights in the constitution. For example, in *Gbemre*'s case[116], the plaintiff filed a suit against Shell, the Attorney General and the Nigerian National Petroleum Corporation (NNPC) to end the practice of gas flaring. The court held that the extant gas flaring laws 'was inconsistent with the Applicant's right to life and/or dignity of human person' as enshrined in the Nigerian Constitution and the African Charter. However, till date the judgement has not been enforced by the appropriate authorities in the country and gas flaring continues unabated.

Although the Nigerian judiciary[117] has consistently held that socio-economic rights are not justiciable, a plethora of scholars have contended that chapter II of the constitution can be made justiciable.[118] Recently, courts in Nigeria have become creative and activist by holding that socio-economic rights are justiciable in Nigeria. For example, in 2013 in *Bamidele Aturu v Minister of Petroleum*[119] a Federal High Court in Nigeria held that the oil subsidy removal and frequent fuel increases by the Nigerian government was illegal and unconstitutional.[120] The plaintiff argued that the deregulation policy in the oil industry was illegal and unconstitutional by virtue of the combined readings or provisions of section 16 (1) of constitution and sections 6(1) Petroleum Act and 4 (1) Price Control Act.[121] Section 16(1) is found in the non-justiciable part (Chapter II) of the constitution. The court held that held that 'the provisions of sections 6(1) and 4(1) of the Petroleum Act and Price Control Act respectively had made justiciable the

[116] Suit No. FHC/B/CS/153/05. Also available online at the African Human Rights Law Database at http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html

[117] See *Archbishop Olubunmi Okogie and Others v The Attorney General of Lagos State* (1981) NCLR 337, 350. However, in *A.G. Ondo State v A.G of Nigeria and Others* (2002) 9NWLR (Pt 772) 222, where it held that the National Assembly is competent to enact laws on corruption by the creation of a national body to tackle the menace. This by virtue of item 60(a) of the Exclusive List of the constitution, only the National Assembly can enact laws to enforce and promote the socio-economic rights in the constitution.

[118] See Oluduro, above n. 111, F. Falana, Fundamental Rights Enforcement in Nigeria2nd edn (Legal Text Publishing; Lagos, 2010)

[119] FHC/ABJ/CS/591/2009; judgment delivered, 19 March 2013

[120] For an extensive analysis of the case, see Akintayo, above n. 65

[121] Ibid

non-justiciable provisions of section 16(1) of the Constitution.'[122] This decision is not binding because it can be upturned by the higher courts. Arguably, 'it opens up possibilities for an activist judiciary to interpret cases on the justiciability of socio-economic rights in Nigeria in a more liberal fashion.'[123]

However, the enforcement of socio-economic rights in Nigeria will be beset by negative socio-economic consequences. For example, 'enforcement of socio-economic rights puts huge financial claims on the state.'[124] This is exacerbated by decades of corrupt leadership and massive theft of state resources thereby depriving Nigerians of access to the basic necessities of life.[125] Arguably, with vast amount of oil revenues that has accrued to the coffers of the country, there is no reason why socio-economic rights including right to the environment should not be enforced by the appropriate authorities whenever they are declared to be justiciable by higher courts in the hierarchy of courts in Nigeria.

Case for Environmental Courts in Nigeria

This article also suggests that specialist environmental courts should be created in Nigeria focusing on environmental rights and ancillary issues to remedy the problems besetting environmental rights litigation in Nigeria which include 'limited resources of litigants, delays in the judicial process, the strict requirement of *locus standi* proof, and the overreliance on common law torts such as trespass, negligence and nuisance in suits by litigants (in the absence of an effective framework on oil pollution control.'[126] However, there are conflicting views on

[122] Ibid at 7
[123] Ekhator, above n. 68 at 71
[124] A. J. Shehu 'The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience' (2013) 2 (1) Journal of Sustainable Development Law and Policy 101
[125] S. Ibe 'Expanding the space for economic, social and cultural rights in Nigeria: feature.' (2014) 15 (2) ESR Review: Economic and Social Rights in South Africa 3
[126] Ekhator, above n. 68 at 66. For an extensive analysis of the barriers in environmental litigation see O. Fagbohun and G.U. Ojo 'Resource Governance and Access to Justice in Nigeria: Innovating Best Practices in Aid of Nigeria's Oil Pollution Victims' (2012) 2 NIALS Journal of Environmental Law 257 at 271-302

the roles of judges in promoting environmental protection or rights in Nigeria. For example, Frynas contends that the judicial attitudes of judges have changed for the better and he gave a plethora of cases to buttress his assertions.[127] Ako on the other hand, avers that Frynas views are 'overly optimistic especially when the judicial attitude is considered against the backdrop of environmental rights litigation.'[128] Thus, scholars have advocated thus:

> focus should be also be on training and advising key actors that may implement extant legal provisions to their advantage. For instance, in relevant cases, the use of amicus curiae, training of local NGOs and legal representatives involved in promoting environmental justice [rights] and even offering training to national judicial officers.[129]

Nigeria should take a cue from India in respect of environmental courts. Due to similar problems besetting environmental rights litigation in India, the judiciary in a plethora of cases and the Law Commission of India in 2003 recommended the creation of a specialist environmental court in the country.[130] In furtherance of this, the Indian Parliament enacted the National Green Tribunal Act in 2010 and the law became functional or operative in July 2011. The Tribunal aims to actualise:

> effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property… it is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues.[131]

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[127] J.G. Frynas 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria' (1999) 43 (2) Journal of African Law 121

[128] Ako, above n. 70 at 436

[129] Ako, above n. 108 at16, M. Uwais, "Recent development in Nigerian strengthening legal and institutional framework for promoting environmental management." Global Judges Symposium on Sustainable Development and the Role of Law, Johannesburg, South Africa. 2002, available at: http://www.unep.org/delc/Portals/119/publications/Speeches/NIGERIA.pdf

[130] G.N. Gill 'Access to Environmental Justice in India with Special Reference to National Green Tribunal: A Step in the Right Direction (2013) 6 (04) OIDA International Journal of Sustainable Development 25 at 31

[131] National Green Tribunal Website, available at: http://www.greentribunal.gov.in/Home.aspx

The two major strengths of the Tribunal include its ability to fast track and decide cases within six months of application or appeal.[132] Also, its adjudicative process involves the judges working in tandem with scientific experts with cognate knowledge in environmental issues and this symbiotic relationship has produced a coherent mechanism 'applying complex laws and principles in a uniform and consistent manner whilst simultaneously reshaping the approach to solve the environmental problem at its source rather than being limited to pre-determined remedies or litigation), amongst others.' [133] To concretize the constitutionalization of environmental rights in Nigeria, specialist environmental courts based on the Indian National Green Tribunal model should be created. Such environmental courts should embed environmental rights (including both procedural and substantive) and premised on not just on humans (anthropocentric) but on an ecocentric perspective. Environmental rights flowing from an ecocentric perspective posits that any 'qualitative definition of environmental rights would entail both human and non-human species.'[134] This is especially relevant in the Niger Delta where the oil industry is majorly located and where the activities of oil multinational corporations have had negative impacts on the environment and people living in the region.

Liberalization of the *Locus Standi* Rule in Nigeria

Recently, the *locus standi* rule has been relaxed in Nigeria by virtue of the new fundamental rights enforcement rules (FREP) 2009 which was made by the Chief Justice of Nigeria. Preamble 3(e) of the FREP rules 2009 abolishes the *locus standi* rule in Nigeria.[135] Arguably, the FREP rules has enhanced procedural pathways for the enforcement of fundamental human

[132] G. N. Gill 'The National Green Tribunal of India: A Sustainable Future through the Principles of International Environmental Law' (2014) 16 (3) Environmental Law Review 183
[133] Gill ibid at 187
[134] A .B. Abdulkadir 'The Right to Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice in Nigeria' (2014) Journal of Sustainable Development Law and Policy in Nigeria 118 at 120-121
[135] Falana, above n. 118

rights in Nigeria. Thus, the FREP rules 'provide for the rules of procedure to be followed in applications for the enforcement or securing the enforcement of fundamental rights in Nigerian courts.'[136]

Furthermore, preamble 3(b) of the FREP rules posits that the courts should respect municipal, regional and international treaties or bills of rights which the court is aware of.[137] Some of these treaties include the African Charter, African regional human rights jurisprudence and the Universal Declaration of Human Rights and other instruments in the United Nations human rights systems.[138] Arguably;

> the [FREP] Rules laid to rest any lingering doubt regarding the justiciability of the socio-economic provisions of the Act including the right to a healthy environment, by expressly defining fundamental rights as including 'any of the rights stipulated in the African Charter on Human and People's Rights (Ratification and Enforcement) Act.[139]

The FREP rules have revolutionised environmental justice in Nigeria by opening up frontiers or access to justice thus, aggrieved victims or NGOs and other stakeholders can utilise these rules in environmental issues.[140] Thus, the FREP rules have improved the procedural obstacles militating against right to the environment in Nigeria.

Conclusion

Like most developing countries in the world, there are bound to be challenges in the implementation of projects and objectives that will enhance sustainable development in Nigeria. However, the fundamental rights of the people of the state to live in a safe and healthy

[136] E. Amechi 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation' (2010) 6(3) Law, Environment and Development Journal 320, 323
[137] Ekhator, above n. 68
[138] ibid
[139] Amechi above n 136 at 329. Also see Ekhator, above n. 68 at 70-71 for the conundrum in enforcing socio-economic rights in Nigeria.
[140] Ekhator, above n. 68 at 78

environment must be perceived to flow from the constitutionally recognised right to life and dignity amongst others. South Africa as we have seen has inevitably made reasonable strides in this direction. In Nigeria, government emphasizes the economic importance of oil and the government's interest in the exploitation of the resource[141] to the detriment of the affected individuals, communities and the environment. It is therefore necessary for Nigeria to join the rank of other countries such as South Africa that have established legally enforceable environmental rights. There could be no better time for the legislators in Nigeria to amend the constitution to expressly recognise a legally binding and enforceable substantive provisions for rights to a healthy environment.[142] Also, the liberalisation of the *locus standi* doctrine by the FREP rules 2009 has also provided another pathway wherein a right to the environment can be embedded in Nigeria in the future.

Furthermore, due to the difficulties inherent in the constitutional amendment process in Nigeria, this article contends that expanding the remit of justiciable rights in Nigeria by the judiciary to include right to the environment is the most likely achievable alternative.

Finally, this paper will align with Professor Ladan, who posited thus:

> The mere existence of law (and a regulatory body) does not in itself create or bring about a change in behaviour. A clean and healthy Nigeria cannot be obtained solely by statutes. There is the added need for information, environmental education and enlightenment of the public. This is the best form of prevention of environmental harm. There must be instilled in the minds of a sizeable proportion of the population an unambiguous message clearly urging the need for a healthy environment. This environmental consciousness will enable the law to function better.[143]

[141] Ako, above n. 70 at 445
[142] Olawuyi, above n. 85 at 218
[143] M.T. Ladan 'Recent Trends in Environmental Regulations in Nigeria' (2014) 44 (5) Environmental Policy and Law 461, 466